ROBERT L. ALDRIDGE, CHARTERED
Attorney at Law
1209 North Eighth Street
Boise, Idaho 83702-4297
Telephone: (208) 336-9880
Fax: (208) 336-9882
State Bar m 1296

STATEMENT/TESTIMONY
Senate Special Committee on Aging
February 11, 2003
Adult Guardianship

1. General Background

Idaho adopted the Uniform Probate Code in 1972, the first State in United States to do so. The Code covers a multitude of subjects, but primarily deals, on the one hand, with probate and related procedures at death, and, on the other hand, protective procedures. This Code, commencing primarily in 1989, has been substantially revised in its subportions dealing with protective procedures, especially conservatorship and guardianship. The emphasis of the changes has been to provide increased protection to the elderly (and others who are the subject of such actions, normally because of age or disabilities). Most of these changes have not been proposals from the Uniform Code Commissioners; instead, they have been crafted to deal with specific problems in the setting of a State that has few public protections for the elderly and extremely limited budgets for any public protections that do exist.

The primary impetus for the changes has come from the Taxation, Probate & Trust Section of the Idaho State Bar, often in partnership with other interest groups. At the time of the commencement of the changes, I was the chairman of the Section, and I have been the Legislative Committee Chairman for the Section for the last fourteen years. The Legislative Committee now consists of approximately thirty-two members, from a wide range of interests, including law, bank trust departments, governmental and quasi-governmental agencies, social workers, accountants, and others, depending on the exact issue. All participation is voluntary and without pay of any nature, other than one hired law clerk. Funding for expenses, and the law clerk, is provided by the Bar Section.

The Idaho legislature meets annually for approximately sixty days, commencing in the first week of January. The legislature itself has very limited expertise, and essentially no professional staff, in areas relating to the protection of the elderly. The administrative agencies charged with such protection (primarily the Idaho Commission on Aging and the Adult Abuse section of the Department of Health & Welfare) have severely limited budgets and personnel.

The Idaho judicial system hears cases regarding the elderly almost exclusively at the Magistrate level. Only one Magistrate in the entire State of Idaho, in Ada County, works primarily in the probate/protective proceedings area, and that Magistrate is also assigned other cases. In all other counties in the State, assignment of such cases is random among all available Magistrates. Magistrates also have, at most, one staff member.

2. Philosophy of changes to Idaho statutes

Because judges, and practitioners, in Idaho have limited experience in protective proceedings, statutory changes have concentrated in spelling out in detail the procedural steps and necessary findings in

protective cases. Additionally, the Bar Section has prepared a detailed Forms book for protective proceedings, with checklists and procedure charts, to guide practitioners, and courts, through the process. For clarity, it should be noted that Idaho calls those who deal with the financial affairs of the protected person a "conservator" and those who deal with the care issues of the protected person a "guardian", unlike many States which refer to those categories, respectively, as "guardian of the estate" and "guardian of the person", or similar titles.

3. Specific changes to Idaho statutes

a. Definition and concept changes The original Idaho Probate Code defined an incapacitated person by a series of categories – e.g., the person was "elderly" or a "chronic alcoholic", or other such labels. The emphasis was on medical disabilities or status. The changes to the Code completely eliminated this method and made the following rules:

1. Incapacity was a legal, not a medical, disability.

2. Incapacity was to be measured by function limitations, which must threaten substantial harm to the person due to an inability to provide for personal needs for food, clothing, shelter, health, or safety, or an inability to manage property or financial affairs.

3. The inability had to be recent, not in the remote past. Isolated instances of simple negligence or improvidence, lack of resources, or of acts which were made by an informed judgment did not show inability to manage one's own affairs. I have frequently, before the Idaho legislature, and other groups, expressed this as the right of the elderly, and each of us, "to be eccentric and even occasionally stupid".

All of the foregoing changes were supported by extensive detailed definitions.

b. Due Process changes in appointment procedures

The following were added, or greatly expanded:

1. Guardian ad Litem The Guardian ad Litem is, essentially, an attorney appointed to represent the protected person. The roles and duties of the Guardian ad Litem were greatly expanded to require full investigation and representation. Provisions were added to the Probate Code that the Guardian ad Litem could not be a member of the same law firm, or an employee thereof, as the Petitioning Attorney and the ethical duties of the Guardian ad Litem were laid out in detail.

2. Court Visitor The Court Visitor is appointed to fully investigate all circumstances surrounding the protected person and to submit a written report to the Court, with recommendations. Provisions were added to the Probate Code which set forth in detail an exhaustive listing of the qualifications necessary for the Visitor and the requirements for the investigation and the written report by the Visitor. The Visitor was required to be trained in law, nursing, psychology, social work, or counseling, and was to be an officer, employee, or special appointee of the court without any personal interest in the action. Like the Guardian ad Litem, the Visitor could not be a member of the same firm, or an employee thereof, as the Petitioning Attorney. The Visitor also had to be a different person than the Guardian ad Litem and could not be the proposed guardian or conservator.

3. Independent Counsel The protected person was given the right to retain independent counsel at any time.

4. Priority of appointment The Code priority list was substantially changed to provide that, prior to the customary lists of spouse, children, and so forth, the protected person could nominate the conservator or guardian orally or in writing during the proceedings, if capable of doing so. If no such nomination was made, then those that the protected person had previously named to fulfill similar roles (agents named in financial powers of attorney as to conservatorship, and/or agents named in medical directives or medical powers of attorney as guardianship) were the first priority for appointment. Only if none of those choices had been expressed were the listings based on relationship to be used.

5. Temporary and Special Appointments The prior Code allowed ex parte temporary appointments of conservators or guardians for up to six months (but with unlimited renewals) without any hearing, without any notice to the protected person, without appointment of a Guardian ad Litem, without appointment of a Court Visitor, and without any required reporting or notices to the protected person or any other "interested persons" under the Code. This allowed tremendous abuse without any protection. The Code was revised dramatically to severely limit the ability to obtain temporary appointments without showing of extreme emergency and to require notice within forty-eight hours to the protected person and others, and with an extensive listing of the rights of the protected person to obtain immediate hearings and other protections. The maximum time limit for appointment was deceased to sixty days. Only the limited powers absolutely necessary to protect the immediate health and safety of the protected person could be granted. A Guardian ad Litem was required to be appointed and the protected person additionally had the right to independent counsel. On request of any interested person, a hearing must be held within five days and a Court Visitor appointed. Temporary appointments could not be renewed.

6. Limited powers The Code was substantially amended to require that only the most limited form of conservatorship or guardianship be granted, with express listings of the actual powers granted, and that the protected person was to retain the maximum rights possible. General conservators and/or guardians were only appropriate when the protected person was completely incapacitated.

c. Post appointment protections

1. Fiduciary Review Committee, Guardianship Monitoring Initial attempts were made by the Bar Section to determine whether required reporting by guardians and conservators were being filed generally, and if filed, were being reviewed by the Court. Incredibly, the case computer listing system of the State could not even identify which cases were conservatorship/guardianship cases, much less whether reports had been filed. After prolonged work with the Idaho Supreme Court to revamp the system, an analysis was made of existing cases in Ada County, Idaho. The vast majority had no initial inventories or any annual reports. A Fiduciary Review Committee was established, composed of several attorneys (including myself) and a trust officer and an accountant. The Committee attempted to track down non-reporters and then obtain reports. Then, the reports which showed serious violations on their face were assigned to a committee member who pursued correction of the violations, including court action if necessary. All participation was on a pro bono basis, with expenses provided by the Bar Section. In a three year period, in only Ada County, millions of dollars were recovered. The Bar Section has now, with major assistance from the AARP, started building a pilot program through the Idaho Department of Finance and the Idaho Office of the Attorney General to extend this program Statewide and to

institutionalize the process, rather than relying on volunteers. The Bar Section has also established a program, in Ada County, to provide a staff person attached to the probate judge to coordinate training and monitoring of guardians, again with AARP assistance and funds from Ada County and from the Bar Section.

2. Guardian ad Litem A program still in its infancy stages is to provide for required participation by the Guardian ad Litem in assuring that proper post-appointment reports are filed and in reviewing those reports. Currently, I am one of the few, and perhaps the only, attorney in Idaho who continues actively in the case as Guardian ad Litem after appointment of a conservator and/or guardian. Legislative changes to clarify and amplify the role of the Guardian ad Litem will be introduced in the next legislative session.

3. Court enforcement A new section of the Code was created to give the Court clear ability to enforce reporting and proper actions by conservators and guardians. The Court could impose fines and could surcharge the conservator/guardian for misapplied funds.

4. ALTERNATIVES TO APPOINTMENT, OTHER PROTECTIONS

1. Financial abuse of the elderly Through a committee of concerned entities and persons, a statutory method was implemented to give financial institutions, and others, the ability to report potential financial abuse of the elderly and for those reports to be acted upon by law enforcement. Through funds provided primarily by the Bar Section, training sessions were set up for bank officers and bank employees throughout the State.

2. Powers of Attorney A substantial review of the Idaho statutes on financial powers of attorney is currently in progress. Such powers are a major source of financial abuse of the elderly. Major revisions will be submitted to the next legislative session, primarily directed at protection of the elderly.

5. REMAINING NEEDS, PROBLEMS

1. Appointment procedures of Guardians ad Litem and Court Visitors Appointments need to be truly independent, made by the Court from approved lists of trained qualified individuals without influence by the Petitioning Attorney.

2. Grants for State or private programs Idaho, like many States, is experiencing severe budget deficits, without sources for funds for innovative programs. Existing programs protecting the elderly are being slashed or eliminated. State legislators are reluctant to fund programs until they are proven. Federal grants to establish pilot programs for innovative methods to protect the elderly would enable local volunteers to establish the programs and then, when the worth of the programs is documented, lobby them into existence as State programs.

3. Establishment of basic rights of the elderly as fundamental due process Fundamental rights of the elderly to self determination must be protected. These rights must be enumerated and made a part of the very fabric of protective proceedings. Such rights must be removed from the elderly only as a last resort, only to the extent absolutely necessary, and only after full due process, and with careful examination of all available alternatives. The emphasis must be on protection, not the convenience of others, including the convenience of the judicial system. Dignity of the elderly must be preserved at all costs, in the face of a system which creates justifiable fear in the elderly and which is often indifferent to, or even contemptuous of, their emotional needs when

that justifiable fear is expressed. The understandable fear by the elderly is even used as proof of the need for protective proceedings. Far too often, the system strips the elderly of their assets, their comforts, and, ultimately, their human dignity.